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No. 91-636

In The  
Supreme Court of the United States

October Term, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,  
v. *Petitioner,*  
MICHIGAN DEPARTMENT  
OF NATURAL RESOURCES, ET AL.,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

ST. CLAIR COUNTY RESPONDENTS'  
BRIEF ON THE MERITS

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**COUNTER-STATEMENT OF QUESTION PRESENTED**

DOES A STATE STATUTE WHICH MANDATES COMPREHENSIVE SOLID WASTE PLANNING AND REQUIRES THAT WASTE TRANSPORTED FROM OUTSIDE A COUNTY OR STATE BE AUTHORIZED FOR DISPOSAL IN A COUNTY'S SOLID WASTE MANAGEMENT PLAN "DISCRIMINATE AGAINST INTERSTATE COMMERCE" WITHIN THE MEANING OF THIS COURT'S DECISIONS IN *MAINE v TAYLOR*, 477 U.S. 131 (1986) AND *CITY OF PHILADELPHIA v NEW JERSEY*, 437 U.S. 617 (1978)?



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ST. CLAIR COUNTY RESPONDENTS'  
BRIEF ON THE MERITS

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COUNTER-STATEMENT OF THE CASE

In the District Court and the Court of Appeals, Petitioner challenged St. Clair County's refusal to amend its County Solid Waste Plan to allow Petitioner to act as a receiver of solid waste generated outside of the county and state under the Commerce and Due Process Clauses of the United States Constitution. Petitioner did not seek review in this Court of their challenge that St. Clair's action violated the Commerce Clause "as applied." In the Petition for Writ of Certiorari, Petitioner, in Footnote 6 on page 4, stated that all claims except the facial challenge have been abandoned, concluding: "Petitioner only seeks review of the denial of the claim that the legislation authorizing such refusal discriminates against interstate commerce."

Michigan's Solid Waste Management Act, Mich. Comp. Laws Ann. §§ 299.401 *et seq.*, is a comprehensive statute created to achieve the state and federal goal of management of all aspects of solid waste, including long term planning for the disposal of solid waste in an environmentally sound manner. The Act *does not* prohibit "the disposal within a county in the state of any solid waste which has been generated outside the county" as the Petitioner claims (Question Presented, Brief of Petitioner). Rather the Act, by way of two amendments adopted in 1988, merely requires that all waste generated outside of a county must be included in a county's Solid Waste Management Plan prior to its importation and disposal. Petitioner does not allege that the State of Michigan does not accept waste generated outside of the state for disposal.

The two amendments, which were enacted to supplement the state's statutory scheme which was already in place, read:

"A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan." Mich. Comp. Laws Ann. § 299.413a.

"In order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan." Mich. Comp. Laws Ann. § 299.430(2).

Under the Act, each county is expected to prepare and implement a twenty-year Solid Waste Management Plan which is to be updated every five years, Mich. Comp. Laws Ann. § 299.425. An advisory Planning Committee is appointed to assist in the preparation of the plan which then must be approved by the County Board of Commissioners and 67% of the municipalities within the county, Mich. Comp. Laws Ann. §§ 299.426, 299.428. Finally, the Director of the Department of Natural Resources must approve the plan which then becomes part of the state's Solid Waste Management Plan, Mich. Comp. Laws Ann. §§ 299.429, 299.432.

Petitioner made a request to the County Solid Waste Planning Committee and was denied. That Committee, under the Michigan Act, has advisory powers only. No request was made to the County Board of Commissioners or to the Director of the Michigan Department of Natural Resources who has supervisory powers and makes the final decision on a County Plan.

Petitioner filed a lawsuit in the St. Clair County Court (Civil Action No. 89-000617-CZ) challenging the denial by the Solid Waste Planning Committee without naming the County Board of Commissioners or the DNR Director. The case was dismissed and no appeal was taken. Petitioner's allegations concerning the landfill capacity, number of acres of land available, the county's landfill needs and the ability to meet those needs were and are denied. Those issues are not before this Court, as Petitioner's challenge is to the validity of the statute on its face or in its practical effect.

### **SUMMARY OF ARGUMENT**

**A.** Petitioner challenges two amendments to the Michigan Solid Waste Management Act. Those amend-

ments are part of a comprehensive legislative scheme for collecting, handling, transporting, storing and disposing of solid waste in Michigan. Under the test of *Pike v Bruce Church, Inc.*, 397 U.S. 137 (1970), the Michigan Statute "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . ." (at 142). Further, the burden imposed on such commerce is not clearly excessive in relation to the putative local benefits. The District Court and Sixth Circuit Court of Appeals both determined that there is no express discrimination and that the design of the legislation is not for economic protectionism, but to carry out a legitimate environmental purpose with little or no burden on interstate commerce. There is no embargo embodied in the legislation, but only a requirement that authorization be obtained in a county solid waste plan which is a part of the state's solid waste plan, for the purpose of identifying waste volume for disposal and assuring adequate landfill capacity.

**B. 1.** Collecting, handling, transporting, storing and disposing of municipal solid waste represents a serious environmental problem. Without aggressive state action, there would be environmental and health problems. Michigan, through its Act, is aggressively attacking and solving its solid waste problem through a comprehensive scheme mandating local governments to collect and dispose of solid waste in a sanitary manner and counties to develop and implement a comprehensive plan for dealing with all aspects of the solid waste flow. Michigan's program is consistent with and was adopted pursuant to the Federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, which requires, in order to obtain federal funding, comprehensive solid waste management plans, including identification of waste to be generated and methods to collect,

handle, transport, store and dispose of solid waste and development of sufficient methods and capacity for incineration or disposal of solid waste. Only through programs to reduce the waste flow, turn waste to energy, and force establishment of additional landfill capacity, does Michigan have its present landfill capacity and will have it in the future. Any unilateral, unplanned and unauthorized shipment of waste from within or from outside of the State will use up landfill capacity and undercut and destroy Michigan's ability to cope with the solid waste crisis.

2. The strict scrutiny test should not be applied in this case as there is a valid legislative purpose which is not an economic protectionist measure. The facts are distinguishable from *City of Philadelphia v New Jersey*, 437 U.S. 611 (1978), which involved an express embargo against importation of solid waste for purely protectionist purposes. Likewise, Petitioner's reliance on other cases, such as *Wyoming v Oklahoma*, 60 U.S.L.W. 4119 (1992); *Dean Milk v City of Madison*, 340 U.S. 349 (1951); and *Polar Ice Cream & Creamery Co. v Andrews*, 375 U.S. 361 (1964), is misplaced as they are economic protectionist cases not involving a valid legislative purpose of protecting the environment, but only protection of local economic interests.

C. 1. Regulation of solid waste is a fundamental and important function of state and local governments, serving the valid public purpose of protecting the environment. This Court should grant Michigan wide latitude to experiment with and develop a comprehensive program for managing solid waste because: (1) an important fundamental function of state and local government is involved, *National League of Cities v Usery*, 426 U.S. 833 (1976); (2) the Court should allow Michigan to carry out its valid governmental purpose in the

absence of Congress acting in this area, *Garcia v San Antonio Metro*, 469 U.S. 528 (1984); and (3) a valid governmental environmental purpose is advanced, *Minnesota v Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) and *Sporhase v Nebraska*, 458 U.S. 941 (1982).

2. Because of the nature of the fundamental interest involved, this Court should either grant due deference to the state statute or, in the alternative, overrule *Philadelphia v New Jersey*. The Respondent County respectfully believes that solid waste is different from items of interstate commerce which will be traded in the market place as it is intended only for incineration or burial. Further, this Court has recognized state and local government's responsibility and role in collection of solid waste and the necessity of flow control. Our nation now needs recognition by this Court of state and local government's role in all aspects of solid waste management without constraints by the interstate commerce clause.

D. Assuming, for argument purposes only, that the strict scrutiny test applies, the Michigan statutory scheme survives that scrutiny utilizing the test of *Maine v Taylor*, 477 U.S. 131 (1985). There is a legitimate local purpose which cannot be served as well by available non-discriminatory means. Michigan is following the dictates of Congress in 42 U.S.C. §§ 6901 *et seq.* in attacking the solid waste problem in a comprehensive manner. Michigan's program, which is under attack in this case, is consistent with and advances an affirmative action program to manage and solve the solid waste crisis. Stopping the flow of waste to landfills without other means of disposing of the waste is not realistic. The impact of *Philadelphia* is to cause a socialization of solid waste treatment with government being a participant at all levels. The Court should encourage creative

solutions to serious environmental problems, instead of restricting important governmental functions.

## ARGUMENT

### I.

**THE MICHIGAN SOLID WASTE MANAGEMENT ACT HAS A LEGITIMATE STATE PURPOSE OF PLANNING AND MANAGEMENT OF SOLID WASTE, DOES NOT DISCRIMINATE AGAINST OUT-OF-STATE WASTE AND HAS ONLY MINIMAL EFFECTS ON INTERSTATE COMMERCE.**

**A. The State Statute Does Not Discriminate Against Interstate Commerce On Its Face Or In Practical Effect, Considering Its Purpose And Any Incidental Effect On Interstate Commerce.**

Petitioner challenges two amendments to the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. §§ 299.401 *et seq.* The amendments were enacted to supplement the preexisting requirement that all waste be identified and included in a County Solid Waste Management Plan. All waste generated in a county is, under the Act, that county's responsibility. All out-of-county but in-state waste had to be included in the County Solid Waste Management Plan before disposal in a receiving county. There was an oversight or gap in the Act in respect to out-of-state waste. To fill that oversight, so that all waste under a county's responsibility is identified and planned for, these two amendments were enacted.

The Act as amended clearly does not discriminate "either on its face or in practical effect," *Hughes v Oklahoma*, 441 U.S. 322, 336 (1979), against interstate commerce. Contrary to Petitioner's claim, there is *no* prohibition in Michigan's Solid Waste Management Act

against the importation and disposal of out-of-state waste. Rather, it merely requires that all waste to be disposed of in the state be planned for and included in the solid waste management plans of the individual counties.

A county's solid waste management plan does not stand alone but, upon acceptance by the Director of the Department of Natural Resources, becomes a part of an overall state-wide plan.

"The state solid waste management plan shall consist of the state solid waste plan developed under the resource recovery act, Act No. 366 of the Public Acts of 1974, being sections 299.301 to 299.321 of the Michigan Compiled Laws, and *all county plans approved or developed by the director.*" Mich. Comp. Laws Ann. § 299.432 (emphasis added).

It is in this context that the challenged amendments and the county plan must be reviewed in deciding whether in fact a violation of the commerce clause has occurred.

There are at least two tests which apply to dormant commerce clause cases, a strict scrutiny standard which applies when a statute is found "to discriminate against interstate commerce 'either on its face or in practical effect,'" *Maine v Taylor*, 477 U.S. 131, 138 (1986), and a less rigid, balancing approach when no per se discrimination against commerce is found.

"In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the

first group violate the Commerce Clause only if the burdens they impose on interstate trade are 'clearly excessive in relation to the putative local benefits,' *Pike v Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny." *Maine*, 477 U.S. at 138.

The Courts below, after reviewing the amendments and their impact on interstate commerce, correctly applied the *Pike v Bruce Church* test in deciding that the Michigan Solid Waste Management Act clearly does not facially or in practical effect discriminate against interstate commerce.

The first test is set forth in *Pike v Bruce Church, Inc.*, 397 U.S. 137 (1970):

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142.

To distinguish between this case where the state law on its face simply requires authorization in the state plan before waste is imported and those cases where there was a prohibition which triggered the use of the strict scrutiny test of *Maine v Taylor*, one merely has to look at the underlying statutes involved. In *Hughes v Oklahoma*, 441 U.S. 322 (1979), the state flatly prohibited the export of natural minnows seined from state waters. "No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state . . ." 441 U.S. at 323-324, n.1. In *Philadelphia v New Jersey*, 437 U.S. 617 (1978), the impor-

tation and disposal of solid waste in New Jersey with a few limited exceptions was banned from the entire state.

"No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State." 437 U.S. at 618, n.1.

These types of statutes are not akin to the Michigan statute. They are clearly economic protectionist measures aimed at halting commerce between the states to the advantage of the local economy. The same type of prohibition was evident in *Maine v Taylor* where the importation of certain baitfish into Maine was prohibited. While facially discriminating against interstate commerce, that ban was found to withstand the strict scrutiny test and was upheld.

Michigan's statute, on the other hand, is not an economic prohibition or a bar to interstate commerce. It is an attempt to regulate the disposal of all waste on a state-wide basis, an exercise of the state's legitimate police power function of rationally addressing a major environmental issue. In order to plan for future waste disposal, the sources and quantity of such waste must be identified. Disposal of out-of-state solid waste in Michigan is permitted but within the confines of the Solid Waste Management Act and the state plan. On its face, the Act evenhandedly requires that all waste to be deposited in the state be accounted for. That, on its face, or in its effect, is not a prohibition.

**B. Solid Waste Presents A Difficult And Serious Environmental Problem And Michigan Is Responding Responsibly To The Challenge.**

Collecting, handling, transporting, storing and disposing of municipal solid waste is a particularly difficult

and serious environmental problem. "Garbage barges" are well known to our nation. The sheer volume of waste is growing.<sup>1</sup> Only by aggressive action is government able to collect, handle, store and dispose of it.

Very few people or communities in this country react favorably to establishing a new landfill in their "backyards."<sup>2</sup> There are many nuisances connected with landfills while they are in operation: Odors, insects, fumes, heavy truck traffic, noise, rodents, blowing paper, and unsightliness to mention only a few. The host community is left when the landfill is completed with a "tomb" of garbage for which there is increasing recognition of serious hazardous waste leakage and liability. All landfills leak at some stage. If liners are insufficient, they leak; yet if liners are adequate, they act as bathtubs and eventually leachate spills over the top.<sup>3</sup>

<sup>1</sup> The generation of municipal solid waste has jumped from 88 million tons in 1960 to 180 million tons in 1988. The EPA now forecasts that total municipal solid waste generation will reach 216 million tons or 4.4 pounds per person per day in the year 2000 and 250 million tons per year by 2010. See generally EPA, *Characterization of Municipal Solid Waste in the United States, 1990 Update*, 21 Env'r. Rep. (BNA) 369, 370 and 879.

<sup>2</sup> "Waste industry advocates, for example, who speak of a landfill capacity crunch as 'crisis' justifying exportation of long-haul trash do not really mean that it is impossible to site disposal facilities nearer to where garbage is generated. Instead, waste industry advocates mean either that, in their opinion, it would be prohibitively expensive to do so, or that it is much cheaper to export trash to sites where the cost of a waste facility is much lower, and where, perhaps, industry profit margins are accordingly higher." Cox, *Burying Misconceptions About Trash and Commerce: Why It Is Time to Dump Philadelphia v New Jersey*, 20 Capital U. L. Rev. 813, 820 (1991).

<sup>3</sup> "The truth today is that there is no perfect place to site a landfill. Today's landfills are manufactured tombs for trash, not naturally occurring disposal sites. Growing awareness

(concluded on page 12)

Landfills are not "natural resources." In *SWIN Resource Systems, Inc. v Lycoming County*, 833 F.2d 245 (3d Cir. 1989), the Court of Appeals, Third Circuit, determined that landfills cannot be considered as "natural resources." They are built on land, but their shortage is not related to a shortage of land. They are manufactured facilities created by society unlike natural resources which occur by "happenstance," *Sporhase v Nebraska*, 458 U.S. 941 (1982).

In Michigan, the Act mandates that counties forecast their solid waste needs and take steps to develop and implement comprehensive solid waste programs to adequately address those needs.<sup>4</sup> Landfill capacity exists today and will only exist in the future if the State of Michigan aggressively *forces* counties to plan for and develop waste reduction, recycling, waste-to-energy, and landfill programs. Therefore, the existence of landfill capacity, contrary to hoarding a natural resource, results only from intensive and aggressive governmental regulation and action.

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(continued from page 11)

that the hazardous constituents of even household trash pose potential threat to the environment means that artificially manufactured barriers are placed in today's landfills to prevent the migration of contaminants from the landfill site. The legacy of former landfills appearing en masse on the National Priorities List for cleanup as Superfund sites finally has sunk home to the public and government, resulting in requirements that landfills be more than holes in the ground." Cox, *supra*, note 2, at page 820-821.

<sup>4</sup> To appreciate and understand the scope of the Act, the entire Act and its Administrative Rules should be read. The Act is found at Mich. Comp. Laws Ann. §§299.401-299.437. A copy of the Administrative Rules is in the Appendix to the Michigan Department of Natural Resources Brief which was filed in the Court of Appeals. A portion of the Act, pertaining to the solid waste plan requirements, is included in the Appendix to St. Clair County's Brief in Opposition to the Petition for a Writ of Certiorari.

As a part of that affirmative action program, forecasting needs and control of waste is absolutely necessary. If a private landfill operator unilaterally, without the consultation and agreement of an appropriate governmental agency, fills available landfill capacity with unlimited amounts of waste, whether from within or from without the county or state, the ability to plan and meet the needs of a county is totally destroyed.

The purpose of the Michigan Act is a comprehensive approach or program to collect, handle, transport and dispose of Michigan's waste in a sanitary manner.<sup>5</sup> It is not a protectionist measure and certainly not an economic protectionist measure.

There are and will be instances when the landfill capacity of a particular county is not sufficient to allow any importation of waste into the county. But, there are also instances where sufficient capacities exist for approval of waste imported from beyond the local county and the state. Petitioner's evaluation of the Michigan Solid Waste Plan (Appendix to Petitioner's Brief), which is comprised of the solid waste plans for the 83 counties, demonstrates there is importation of wastes from outside of the State of Michigan. Importation of out-of-state waste is authorized by the state and Michigan is not discriminatory. In Michigan, waste crosses state and county lines upon request and inclusion in the appropriate county plans.

Under the Michigan Constitution, each statute is required to state its object in its title. Mich. Const., Art. 4, § 24. The purpose of the Solid Waste Management Act is stated as follows:

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<sup>5</sup> Michigan's Act requires counties to develop a program including collection and transportation, etc. See Mich. Comp. Laws Ann. §§299.425(1) and 299.430.

"AN ACT to protect the public health and the environment; to provide for the regulation and management of solid wastes . . ." Mich. Comp. Laws Ann. § 299.401.

These are goals clearly within the police power of the state. The Act itself is an integrated and comprehensive approach to the entire solid waste problem.

The Solid Waste Management Act impacts all levels of waste disposal; it places an affirmative duty on each city and county to ensure waste is collected and disposed of in a sanitary manner (299.424(1) and 299.425(1)), sets standards for the transportation of waste and provides for licensing and management of landfills. Most importantly, it mandates development and implementation of comprehensive county solid waste management programs.

The St. Clair County Plan cannot be viewed in isolation, for a county plan, upon approval by the Director, becomes a part of the state plan. Mich. Comp. Laws Ann. § 299.432. Michigan recognizes that the management and disposal of solid waste is clearly an area which demands uniform statewide treatment. *Southeastern Oakland County Incinerator Authority v Avon Township*, 144 Mich. App. 39, 372 NW.2d 678 (1985). The fact that one county bans the importation of waste is not relevant without consideration of that county's needs and landfill capacity and consideration of other plans approved by the Director. Since the state plan does not prohibit the disposal of out-of-state waste, there is, in effect, no discrimination. Michigan is one marketplace and remains available as a depository of solid waste for interstate commerce.

Two Michigan Courts have considered and ruled on whether a valid public purpose is served by the

Michigan Act requiring pre-approval of the movement of solid waste across county lines.

"The real issue here is whether Act 641 [Solid Waste Management Act] authorizes the state to control the intercounty flow of solid waste material."

\* \* \*

"While the specific requirements governing waste management plans were to be developed by the director of the DNR, the Legislature did instruct that the administrative rules include a provision directing counties to evaluate whether 'the plan area has, and will have during the plan period, access to a sufficient amount of available and suitable land \* \* \* to accommodate the development and operation of solid waste disposal areas'. MCL 299.430(1)(h); MSA 13.29(30)(1)(h). The Legislature has thus clearly indicated that a county's reliance on a specific landfill site is to be identified in its waste management plan.

"If the state is to implement a workable solid waste management plan, then the individual county plans on which it is based must be reliable. A county plan which identifies a privately owned facility for the disposal of solid waste only from that county must be enforceable. Were we to construe Act 641 and the administrative rules promulgated thereunder to allow private businesses to operate their facilities in a manner inconsistent with a county waste management plan, we would frustrate the intent of the Legislature in enacting Act 641." *County of Saginaw v Sexton*, 150 Mich. App. 677, 684-685, 389 N.W.2d 144 (1986).

"Our review reveals that the legislative objective was to foster comprehensive planning for the

disposal of said waste at the local level and to integrate state licensing with those plans so that the disposal of waste within the planning area would be compatible with the local plan. Additionally, enactment of the statutory planning and licensing scheme reasonably relates to the purpose of correcting past planning and licensing inadequacies. By placing primary planning at the county level, the scheme provides for reasoned planning for disposal sites based in part on the county's projected capacities and waste generation rates. Each county is permitted to address local concerns and to adapt its plans to local conditions while at the same time safeguarding parochial decision-making by requiring the plan to be approved for inclusion in the state plan. The rules and the act provide a method whereby a county can develop a plan which is workable and will not be disrupted by future disposal of waste from sources not accounted for during the planning process." *Fort Gratiot Charter Township v Kettlewell*, 150 Mich. App. 648, 653-654, 389 N.W.2d 468 (1986).

Michigan has an integrated state plan created under a federal mandate to address a national problem. In adopting Chapter 82, Solid Waste Disposal, of Title 42, Congress made the following finding with respect to solid waste:

"that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership

in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." 42 U.S.C. § 6901(a)(4).

Under the Federal law, state and regional solid waste plans are encouraged and according to the guidelines for such plans, the *volume* of solid waste to be serviced must be included, 42 U.S.C. § 6942. Financial assistance is made available to states, counties, municipalities, and intermunicipal agencies which "shall include assistance for facility planning and feasibility studies, . . . surveys and analyses of market needs . . ." 42 U.S.C. § 6948(a)(2)(A). Planning inherently requires that the amount of the waste to be disposed of at a site be identified. Without such knowledge, all planning is futile. It is important to recognize that Michigan's efforts are important on a national as well as a local basis.<sup>6</sup>

The offending statute in *Philadelphia v New Jersey*, banning the importation of any waste for disposal in New Jersey's landfills, was adopted in 1974, two years before the passage of the Federal Solid Waste Management Act, 42 U.S.C. §§ 6901 *et seq.* In fact, one of the first questions resolved by the Court in its review of the case was whether the later federal act had preempted the New Jersey law. Obviously, since it was passed two years prior to the federal act, there could be no compliance with the federal guidelines for acceptable solid waste management plans.

Recognizing the dislike and fear which landfills inspire on a local basis, the so-called "not in my backyard" or "NIMBY" syndrome, Michigan has acted to force the

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<sup>6</sup> Also see 42 U.S.C. §6952(a)(2) for further guidelines.

responsibility onto its counties, Mich. Comp. Laws Ann. § 299.430(4). It is only when local governments are forced to actually face the problem and address their own needs that alternate solutions to the solid waste problem will emerge. Therefore, unlike other land uses, the siting of landfills was specifically exempted from the control of local zoning and mandated by the state in order to assure sufficient disposal capacity for the future. It is the intent of the state that the need for all landfills eventually be eliminated; however, that can only occur if the state is allowed to plan today.

Therefore, under the Michigan Act, solid waste management plans are not merely concerned with landfill capacity and its use in the disposal of solid waste. Rather, each plan is required to explore alternate methods of disposal including recycling and composting prior to its acceptance by the Department of Natural Resources.

"The director shall not approve a plan update unless:

"(a) The plan includes an analysis or evaluation of the best available information applicable to the plan area in regard to recyclable materials and all of the following:

"(i) The kind and volume of material in the plan area's waste stream that may be recycled or composted.

"(ii) How various factors do or may affect a recycling and composting program in the plan area. Factors shall include an evaluation of the existing solid waste collection system; materials market; transportation networks; local composting and recycling support

groups, or both; institutional arrangements; the population in the plan area; and other pertinent factors.

- “(iii) An identification of impediments to implementing a recycling and composting program and recommended strategies for removing or minimizing impediments.
- “(iv) How recycling and composting and other processing or disposal methods could complement each other and an examination of the feasibility of excluding site separated material and source separated material from other processing or disposal methods.
- “(v) Identification and quantification of environmental, economic, and other benefits that could result from the implementation of a recycling and composting program.” Mich. Comp. Laws Ann. § 299.430a.

By requiring each county to provide such alternate methods of disposal, Michigan is, in fact, “slowing the flow of all waste into the State’s remaining landfills.” *Philadelphia, supra*, p. 626. If a state and its counties act to reduce the flow of waste into its landfills with the ultimate goal of eliminating such method of disposal by way of long term planning including recycling, incineration and composting, it has responsibly slowed the flow of waste. However, to do so, it must also be allowed to plan for the disposal of all waste which will be disposed of in-state, including that entering its borders from without.

The Act clearly mandates the reduction of landfill use in the near future:

"The director shall develop a strategy to encourage resource recovery and establishment of waste-to-energy facilities. . . . The report shall recommend public and private sector incentives and suggest potential regulatory relief to remove constraints on the siting of waste-to-energy and resource recovery facilities. The strategy and report shall be prepared with the goal of reducing land disposal to unusable residuals by the year 2005." Mich. Comp. Laws Ann. § 299432(4).

A heavier burden is placed upon waste which is to be disposed of in a Michigan county which was generated in-state but outside the county for it is required that, in such a case, provision for the disposal of such waste must be included in *both* plans. That is not true of out-of-state waste to be disposed of in Michigan. "The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." *Minnesota v Clover Leaf Creamery Company*, 449 U.S. 456, 473 n.17 (1981). All counties in Michigan are under the same mandate to develop responsible programs for dealing with their own solid waste, including recycling and other techniques. In addition, a county may, before accepting waste from another county, require assurances that the other county utilizes similar waste reduction methods as are used in the receiving county.

The effect of the amendments on out-of-state waste is minimal, but the difference to Michigan immense. Without identifying waste for importation, all efforts to responsibly address the state-wide problem of long-term solid waste disposal are just a waste of time.

## II.

**THE STRICT SCRUTINY TEST SHOULD NOT BE APPLIED IN THIS CASE AS THERE IS A VALID LEGISLATIVE PURPOSE WHICH IS NOT AN ECONOMIC PROTECTIONIST MEASURE.**

**A. This Case Is Distinguishable From *City Of Philadelphia v New Jersey*.**

All solid waste and landfill cases now turn on this Court's holding in the *City of Philadelphia v New Jersey*, 437 U.S. 617, 624 (1978) where this Court decided:

"The crucial inquiry, therefore, must be directed to determining whether ch 363 is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."

The Court's focus was on whether or not the New Jersey regulation was a economic protectionist measure.

In *Philadelphia*, the state law expressly prohibited out-of-state waste from the state. This Court considered at length and tried to identify a legislative purpose other than economic protectionism, but could not. At pages 626 and 627, the Court concluded that there was a dispute as to the ultimate legislative purpose, but that was not important as the law, on its face, was discriminatory to interstate commerce. The Court held the New Jersey law was an economic protectionist measure and invalid.

Contrary to *Philadelphia*, here the complained-of requirement of obtaining authorization in a county plan of the importation of any waste is a part of a comprehensive approach to coping with and solving the solid waste problem in Michigan. It is absolutely not an economic

protectionist measure designed to stop out-of-state waste from coming into Michigan.

The Michigan Act and its administrative rules demonstrate that the decision on allowing waste at any particular landfill or in any particular county is not an arbitrary decision. County plans must be developed consistent with the Act and its administrative rules which require extensive studies and adoption of methods and procedures for dealing with solid waste including recycling, resource recovery, waste-to-energy and other innovative techniques.<sup>7</sup> Landfilling waste is only one aspect of the process. Michigan's Solid Waste Management Act is, in fact, working as it is forcing counties to deal affirmatively with the solid waste problem. Innovative programs are developing. It is unfair of Petitioner to characterize this case as an attempt by the Michigan Act to discriminate against out-of-state waste.

Similarly, *Philadelphia* implied that landfills are a natural resource and New Jersey could not hoard that resource. But landfills are not natural resources and can be located virtually anywhere with proper engineering. Michigan counties as a result of the statutory mandate are both 1) developing new landfills and 2) slowing the flow of waste to landfills to reduce the dependency upon them. Reading Act 641 and its administrative rules in their entirety is necessary to understand this. Michigan is creating landfill capacity and should be allowed to regulate the use of its existing and future landfill capacity as a part of its fundamental regulatory powers. There is no hoarding of landfill capacity in this case, contrary to *Philadelphia*, but the creation of state landfill capacity through careful planning, conservation and regulation.

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<sup>7</sup> See Note 4, *supra*.

The requirement of the Michigan Act that all out-of-county waste, which includes out-of-state waste, must be authorized for import into a county, is not designed to control waste on the basis of where it originates, as contended by Petitioner. Its purpose is to identify what waste must be planned for and then to provide adequate landfill capacity. The origin of the waste is not important, but identifying volume and controlling that volume for planning and implementation purposes is.

In *Philadelphia*, this Court did not find a legitimate comprehensive program for dealing with solid waste. Michigan has followed the requirements of RCRA and is actively carrying out an aggressive program to deal with the serious environmental problem of solid waste. Only in this way may Michigan avoid garbage piling up in its streets and the sundry other environmental and sanitary problems associated with collection, storage, handling, transporting and disposal of solid waste.

Garbage should not be considered as a commodity or item of commerce. Garbage is not like cantaloupes, fish, shoes, lumber or any of an endless list of products and goods which have been the subject of commerce clause cases. Garbage is waste from our society that must be recycled, reduced, incinerated or buried.<sup>8</sup> It is a fundamental function of government to collect, handle, store, recycle, burn or bury garbage and other solid waste. Landfills are not natural resources but necessary evils which are difficult to establish because nobody wants them due to their many problems while operating and for many years afterwards.

In *Philadelphia*, the majority opinion suggested New Jersey had the option, instead of restricting out-of-state waste as was done in that case, of stopping or slowing

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<sup>8</sup> Cox, *supra*, note 2, at 828-829.

the flow of waste to its landfills on a non-discriminatory basis, or to become a landfill owner and a market participant. Justice Rehnquist's dissent properly pointed out that that amounts to a Hobson's choice. Realistically, a state cannot stop all waste from going to its own landfills as it has a responsibility to dispose of its solid waste. Restricting the flow to landfills would mean the pile-up of garbage in the streets or complete shipment of waste out-of-state. If every state did that, chaos would result. Yet the other alternative would cause the complete socialization of landfills<sup>9</sup> where government owns and operates all landfills in order for a state to control its own fate and cope with its own mounting solid waste problem.

**B. The Cases Cited By Petitioner All Involved Economic Protectionist Measures Which Are Easily Distinguishable From This Case.**

There is nothing in the Michigan Act which can be construed to have a protectionist purpose. No local economy is favored by being required to plan for the long-term disposal of its own waste. Rather, the state is forcing its counties to act responsibly while retaining ultimate control to assure that local protectionist interests are kept in check. The very nature of landfills makes state-wide planning imperative for no community, left on its own, would choose to place a landfill within its borders. If the Act did not have a provision that all waste must be identified in the local solid waste management plan before it is disposed of, the whole statutory scheme would be gutted. There would be no way of knowing how much waste would be imported into a landfill and therefore, its life span could not be esti-

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<sup>9</sup> 81% of all landfills in the United States are owned by states or local units of government. 53 Fed. Reg. 33, 318 (1988).

mated. Without identification of the amount of waste projected for disposal, there can be no planning.

It is for this reason that Petitioner's reliance on *Dean Milk Co. v City of Madison*, 340 U.S. 349 (1951), is misplaced. There, Madison passed an ordinance which required that any milk sold in the City be pasteurized within five miles of the central square and be produced within twenty-five miles. It involved a strictly economic protectionist measure *prohibiting* the sale of competitive products. There was no overall state regulatory scheme aimed at serving a legitimate public purpose in *Dean Milk*. There was only a blatantly parochial motive of protecting local milk producers. Although *Dean Milk* is not cited in the Sixth Court's opinion (hardly surprising since the case was not even raised by the Petitioner until its Reply Brief before that Court), it simply does not negate the lower courts' decisions.

There remains a fundamental difference between the cases. *Dean Milk* dealt with a clearly economic regulation. The ordinance in *Dean Milk* was in violation of the Commerce Clause both on its face and in its effect. There the ordinance:

"[I]n practical effect exclude[d] from distribution in Madison wholesome milk produced and pasteurized in Illinois . . . In thus erecting an *economic barrier protecting a major local industry* against competition from without the State, Madison plainly discriminates against interstate commerce." 340 U.S. at 354 (emphasis added).

The Petitioner makes much of a one sentence footnote stating that "it is immaterial that Wisconsin milk from outside the Madison area is subjected to the same prescription as that moving in interstate commerce," *Dean Milk*, 340 U.S. at 354, n.4, but the fact is that *Dean Milk*

itself is immaterial to the challenge to the Michigan amendments. The ordinance in *Dean Milk* was clearly subject to the strict scrutiny test, with the Court examining first the legitimacy of the local purpose and then whether less discriminatory alternatives existed. The sole purpose was found to be pure economic protectionism. In addition, the Court found that non-discriminatory alternatives existed.

But in this case, where Michigan's statute and the plan promulgated thereunder are neither facially invalid nor have a discriminatory effect, the proper test is a weighing of the incidental effects of the amendments on interstate commerce against the obvious state-wide benefits of solid waste planning for the future. Where the regulation in *Dean Milk* operated to prohibit the importation and sale of any milk not pasteurized within five miles of Madison, the amendments to the Solid Waste Management Act merely require that waste be identified in local plans in order to assure that long term needs for the disposal of in-state *and* out-of-state waste can be met. The effect of the amendments has not been to forbid the importation of solid waste into Michigan for Petitioner has admitted that such importation is currently allowed. As the lower courts stated, "Although ultimate authority for acceptance of a county's plan resides with a single official under MSWMA, Mich. Comp. Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this official has used this authority to reject county plans proposing the importation of out-of-state waste." *Bill Kettlewell Excavating, Inc. v Michigan Department of Natural Resources*, 732 F. Supp. 761, 764 (1990); *Bill Kettlewell Excavating, Inc. v Michigan Department of Natural Resources*, 931 F.2d 413, 417 (6th Cir. 1991). That one county under these amendments chooses not to allow the disposal of out-of-state or out-of-county waste has a minor effect on interstate com-

merce. Each Michigan county is required under state law to manage and plan for waste disposal for the next twenty years whether this is provided by landfill space or other alternatives. This is clearly a necessary health measure within the power of the state to require. "For Commerce Clause purposes," the Supreme Court has "long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other." *Sporhase v Nebraska*, 458 U.S. 941, 956 (1982).

This is the real difference between the various cases cited by the Petitioner and the Michigan law: the nature of the regulation. Where all of those laws and regulations blatantly shielded local industries from outside competition, the Michigan amendments are firmly rooted in protecting the health, safety and welfare of its citizens. *Polar Ice Cream & Creamery Co. v Andrews*, 375 U.S. 361 (1963), involved a price fixing scheme which required Polar not only to pay higher prices for Florida milk but to purchase milk in excess of its needs despite the ready availability of cheaper out-of-state milk. Milk could only be imported if local supplies were inadequate. Likewise, in *Brimmer v Rebman*, 138 U.S. 78 (1891), meat slaughtered more than one hundred miles from its place of sale in Virginia was required to be inspected for a fee of one cent per pound, a "heavy charge", 138 U.S. at 81, which would make competition with local meat impossible. It was the effect of the law which was decisive, not the fact that some in-state meat was also impacted. The "inspection fee" was nothing more than a tax in disguise. However, that is not the case in Michigan where there is no discriminatory effect.

Petitioner places much reliance on *Wyoming v Oklahoma*, 60 U.S.L.W. 4119 (1992), decided by this court on

January 22, 1992. But, in that case, the state statute required coal burned in Oklahoma coal-fired electric generating plants to burn a mixture of coal containing at least 10% Oklahoma-mined coal. In previous years, 100% of the coal in Oklahoma coal-fired electric generating plants came from Wyoming. This court determined the Oklahoma statute was an economic protectionist measure, discriminating both on its face and in practical effect. That is not at all similar to the facts in this case.

In *New Energy Co. Of Indiana v Limbach*, 468 U.S. 269 (1988), this court struck down an economic protectionist measure which denied a tax credit to gasohol dealers if the ethynol came from a state that did not grant a similar credit, exemption or refund for ethynol from Ohio. As an economic measure, the court held that this was discriminatory, even though there was a promise to remove the restriction if reciprocity was shown. Petitioner cites this case for the court's holding that the fact that the impact was only slight, involving only one Ohio ethynol manufacturer, didn't affect the invalidity of the tax. But the tax was clearly an economic protectionist measure having an impact which is distinguishable from the several cases where there may be an economic effect but the regulation is valid within the legitimate state and local powers.

Petitioner has cited *United Building & Construction Trades Council of Camden County and Vicinity v Mayor of Camden*, 465 U.S. 205 (1984), where there was a restriction on a private contractor doing business with the city requiring that a certain percentage of employees had to be residents of that city. This court struck down the requirement that a private contractor hire certain individuals based on residency of an area less than the entire state. That is distinguishable from this case where the State DNR Director must approve solid waste

plans based on specific standards for development of those plans related to county and state needs and available landfill capacity.<sup>10</sup>

### III.

#### REGULATION OF SOLID WASTE IS A FUNDAMENTAL AND IMPORTANT FUNCTION OF STATE AND LOCAL GOVERNMENT SERVING THE VALID PURPOSE OF PROTECTING THE ENVIRONMENT.

##### A. The Michigan Act Is Environmental Legislation Which Should Be Allowed To Stand Without Interference By The Courts.

It is difficult from reading this Court's many cases on interstate commerce to ascertain exactly what standard

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<sup>10</sup> The other cases cited by Petitioner in Section I. A. of its Brief are discriminatory cases and unquestionably involve economic protectionist measures. Perhaps the most blatant is *Bacchus Imports, Ltd. v Dias*, 468 U.S. 263 (1984), where Hawaii imposed a 20% excise tax on the sale of liquor at wholesale, while exempting certain locally produced alcoholic beverages. In *Armco, Inc. v Hardesty Tax Comm. of W. Va.*, 467 U.S. 638 (1984), West Virginia imposed a gross receipt tax on businesses, exempting local manufacturers. In *Great Atlantic & Pacific Tea Co., Inc. v Cottrell*, 424 U.S. 366 (1976), a Mississippi regulation provided that milk and milk products from another state could be sold in Mississippi only if the other state accepted milk or milk products produced and processed in Mississippi on a reciprocal basis. This was struck down as precisely the kind of hindrance to the introduction of milk from other states condemned as unreasonable under the commerce clause. *Edwards v California*, 314 U.S. 116 (1941), involved a criminal statute prohibiting bringing or assisting in bringing an indigent person who is not a resident into the state. The court struck that down as a purely economic protectionist measure. *D. E. Foote & Co., Inc. v Stanley, Comptroller of the State of Maryland*, 232 U.S. 494 (1914), involved invalidation of a Maryland law requiring excess fees which were found to be a burden on interstate commerce. *Minnesota v Barber*, 136 U.S. 313 (1890), involved a statute that all cattle, sheep and swine slaughtered for human food be inspected by Minnesota inspectors within 24 hours of death. The court invalidated this as a pure economic protectionist measure. Other similar holdings are

or test should apply in which case. Writers have suggested this Court allows deference to state acts when environmental regulations are involved if they are designed for and do promote protection of the environment. It appears that this Court generally allows a statute to stand if it has a good purpose which is not economic protectionism. Further, this Court's approach to state regulations and the commerce clause has been altered as a result of the decision of *Garcia v San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

The Michigan Act must be upheld for the reason that the Act withstands the test in *Pike*. As the Court of Appeals held, the statute regulates even-handedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental. In addition, the discussion in this section of the Brief analyzes and comments on cases as they might bear some importance on this Court's general approach to interstate commerce questions involving similar state regulations.

Professor Regan's article,<sup>11</sup> the "Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," was referred to extensively in Petitioner's Brief. There is no question Professor Regan believes this Court was correct in deciding *Philadelphia v New Jersey* on the facts that were involved in the case

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(continued from page 29)

*Voight v Wright*, 141 U.S. 62 (1891) (inspection fee); *Walling v Michigan*, 116 U.S. 446 (1885) (discriminatory tax on liquor); *Guy v Baltimore*, 100 U.S. 434 (1880) (discriminatory wharfage fees for out-of-state goods); *Hannibal & St. Joseph R.R. Co. v Husen*, 95 U.S. 465 (1877) (restrictions on driving cattle into the state to favor in-state ranchers); and *Welton v State of Missouri*, 91 U.S. 275 (1875) (license tax on selling machines).

<sup>11</sup> 84 Mich. L. Rev. 1091 (1986).

in that there was an express embargo against solid waste as an economic protectionist measure, without some other identifiable legitimate state purpose. That is not to say Professor Regan would conclude the same about a state statute involved in this case.

Professor Regan's thesis is that this Court, over the years, has really not performed a balancing test, but has decided whether a particular state act or regulation has as its motive a good purpose other than protectionism. If a statute is not protectionist, "... that is the end of the matter. The statute should be upheld. There is nothing else to consider and no balancing to be done."<sup>12</sup> He argues that if there is a good purpose intended by the legislature in enacting a statute, states should be allowed to function, even if there is incidental effect on interstate commerce. In promoting federalism, a state should be able to act so long as there is no constitutionally stipulated policy to the contrary.

In *Exxon Corp. v Maryland*, 437 U.S. 117 (1978), the state statute was upheld even though it impacted interstate commerce. The Court determined there was a valid purpose of avoiding shortages at gasoline stations, even though the statute prohibited producers or refiners of petroleum from operating service stations in Maryland.

This Court, in *Minnesota v Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), upheld a state prohibition against the sale of milk in plastic non-returnable containers, which obviously impacted interstate commerce. While recognizing environmental protection measures are subject to the commerce clause, the Court gave importance to Minnesota's environmental purpose.

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<sup>12</sup> *Id.* at page 1100.

In *Maine v Taylor*, 477 U.S. 131 (1986), this Court upheld a discriminatory measure forbidding importation of minnows because there was a legitimate state purpose of protecting the environment and there were no reasonable alternative methods available. This Court upheld a Montana law which imposed a seven and a half times greater elk hunting license fee on non-residents in *Baldwin v Fish and Game Commission of Montana*, 436 U.S. 371 (1978). While not deciding the case based on the state's title to its wildlife, this Court recognized a legitimate state interest in protecting its wildlife as a resource. The otherwise discriminatory regulation was upheld as Montana had spent considerable sums and had followed conservation measures which accounted for the existence and size of the herd of elk. The Court recognized the state's investment of money and conservation as justifying the otherwise discriminatory provision.

No matter how much Petitioner attempts to distinguish *Sporhase v Nebraska*, 458 U.S. 941 (1982), it does have importance to this case. While the reciprocity requirement was struck down utilizing the strict scrutiny test, the Court recognized and validated Nebraska's purpose of protecting its ground water especially since conservation measures accounted for the supply of water.

"Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." at page 957.

The challenged regulation prohibited transportation of groundwater for use in another state without permis-

sion of a state official. The Court held that was not discriminatory on its face.<sup>13</sup>

The Michigan statute before this Court is environmental legislation designed to collect, store, transport, handle and dispose of garbage and other solid waste in a sanitary manner. The state's activism in this area, through a comprehensive mandated program, is very similar to the conservation measures in the *Baldwin* and *Sporhase* cases. Here, however, it is even stronger than in either of those cases, for in Michigan, the County has an affirmative statutory duty to carry out conservation measures, through planning and implementation of a solid waste program. The State has a fundamental duty to collect and dispose of waste in a responsible and sanitary manner.

But for Michigan's efforts, its waste stream would be larger and there would not be sufficient landfill capacity to serve the needs of the State of Michigan. States have a vested interest in their landfill capacities and have a right to regulate the entire scope of the solid waste process.

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<sup>13</sup> Other cases in which a legitimate local purpose was the main, if not the only point of inquiry are: *Parker v Brown*, 317 U.S. 341 (1942) (state regulation of price and level of distribution for raisins for purpose of stabilizing market price); *Milk Control Board of the Commonwealth of Pennsylvania v Eisenberg Farm Products*, 306 U.S. 346 (1938) (state required licensing and bonding of milk dealers involved in processing or transporting milk in or out-of-state consumption); *Henneford v Silas Mason Company*, 300 U.S. 577 (1936) (state imposed 2% sales tax on items purchased within state and 2% use tax on items brought in from out-of-state for use therein); *Breard v Alexandria*, 341 U.S. 622 (1950) (local ordinance requiring permission of owners prior to door-to-door solicitation); and *Cities Service Gas Co. v Peerless Oil & Gas Co.*, 340 U.S. 179 (1950) (price minimums for removal of natural gas from certain fields to prevent rapid and uneconomic dissipation of natural resources).

**B. States Have A Fundamental Responsibility In Regulation Of Solid Waste, And Either Due Deference Should Be Accorded To States Which Are Responsibly Managing The Waste Stream Or, In The Alternative, Philadelphia Should Be Overruled.**

*Philadelphia v New Jersey* has not solved but has exacerbated the solid waste crisis. Many cases have gone to the state and federal courts over different methods to manage the solid waste flow. Collection, handling, storing, transporting and disposal of solid waste are all part of the same process and are uniquely local in nature. *Philadelphia* has made it difficult for most states to cope with providing for their own needs, much less having their available landfill capacity used up by the indiscriminate interstate solid waste stream.<sup>14</sup>

Government must be involved in solid waste, either as a market participant, a regulator or a facilitator. Garbage and solid waste represents a serious environmental threat of an inherently local nature. If there is no way to handle, reduce, or dispose of garbage, it will pile up in the streets and the health of cities and towns throughout the nation will be in danger. Without the

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<sup>14</sup> Three Courts of Appeals, the Eleventh in *Diamond Waste, Inc. v Monroe County, Georgia*, 939 F.2d 941 (11th Cir. 1991), the Ninth in *Evergreen Waste Systems, Inc. v Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987), and the Sixth in this case, have found that, under certain circumstances, it is permissible to limit the importation of solid waste into areas of a state. These cases do not conflict with the *Philadelphia* decision but rather they clarify and complement that decision. In *Evergreen Waste Systems, Inc.*, "[t]he ban accompanied other measures designed to restrict the flow of waste going into the landfill and thus extend its useful life " 820 F.2d at 1483. In *Diamond Waste, Inc.*, a state statute required prior permission for the disposal of out-of-state or out-of-county waste. Although the court struck down the local resolution, it held that the statute was constitutional. It also held that, in other circumstances, the county ban might also have been upheld.

State of Michigan preempting zoning ordinances and mandating creation of sufficient landfill capacity, no new landfills would be sited in the State of Michigan. The crisis will grow more critical than it even is today.

The Sixth Circuit in *Hybud Equipment Corp. v City of Akron, Ohio*, 654 F.2d 1187 (6th Cir, 1981), remanded on other grounds, 455 U.S. 931 (1982), recognized what is traditionally a fundamental responsibility of state and local government. *California Reduction Co. v Sanitary Reduction Works of San Francisco*, 199 U.S. 306 (1905); *Gardner v Michigan*, 199 U.S. 325 (1905).

"Control of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment. Ordinances regulating garbage collection and disposal are rationally related to a matter of legitimate local concern. Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating or restraining competition among private collectors. See Annots., 'Validity of Statutory or Municipal Regulations as to Garbage,' 15 ALR 287 (1921); 72 ALR 520 (1931); 135 ALR 1305 (1941). If any area of the law can be said to be well settled, this one is." *Hybud*, at page 1192.

In that case, the Sixth Circuit upheld a flow control ordinance which controlled the waste stream at the point of collection in order to fuel its energy recycling plant. It has long been recognized that local government may control who can pick up garbage and where it goes. The state is not mandated by any federal constitutional provision to go across state lines and pick up

garbage. Control of the waste stream to the point of burial should also be recognized as a part of this fundamental function of state and local government.<sup>15</sup>

In a proper case, it is possible under *National League of Cities v Usery*, 426 U.S. 833 (1976) that this Court could have decided that a comprehensive program to deal with solid waste was part of a fundamental function of state and local government and therefore, exempt from interstate commerce analysis. Of course, that is not possible in view of *National League of Cities* being overruled by *Garcia v San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1984).

In *Garcia*, this Court decided to take another tack in its interstate commerce analysis pertaining to state functions.<sup>16</sup> The Court reasoned that Congress has broad powers to regulate commerce and the states are protected in that they are represented in Congress. The nature and extent of regulation of our nation's market place should properly be decided by Congress, not the Courts, in the exercise of its commerce power. There the states are represented and have a voice in setting that policy. Since Congress has not acted to restrict state's rights in respect to regulation of solid waste, the Courts should not become involved. That is not to say

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<sup>15</sup> In applying the market participant doctrine, the court has recognized that, when a state takes actions which are labor intensive or husband resources, these actions ought to be rewarded or there will be a disincentive. *Reeves, Inc. v Stake*, 447 U.S. 423 (1980).

The solid waste context illustrates the need for allowing states to capture the benefits of their investments. Pomper, *Recycling Philadelphia: "Natural" Resources, and the Solid Waste Crisis*, 137 U. of Penn. L. Rev. 1309, 1333 (1989).

<sup>16</sup> Hinshaw, *The Dormant Commerce Clause After Garcia: Application to the Interstate Commerce of Sanitary Landfill Space*, 67 Ind. L. J. 511 (1992).

that when a state enacts an express economic protectionist measure that the courts shouldn't step in.

RCRA's provisions in respect to solid waste which allow states to obtain federal funding if EPA's guidelines are followed, represents Congress' decision to allow the states to develop solid waste management plans and not to otherwise become involved in restrictions on states carrying out a reasonable regulatory scheme.

Responsibility for solid waste is uniquely local in nature as collection and disposal of garbage is primarily a function of local government. Michigan preempts local zoning laws and forces establishment of landfills as needed, Mich. Comp. Laws Ann. § 299.430(4). It would be unfair for the nation as a whole as a policy matter to require some states to create more and more landfill capacity for other states. In respect to solid waste, it is reasonable to expect all states to take the steps Michigan has taken. This will best serve the national union which is the purpose of the commerce clause.

Considering the holding of *Garcia*, the Michigan Solid Waste Management Act has a valid purpose and is a valid attempt by the State of Michigan to deal with a difficult societal problem. There is a need in our nation today to deal with the difficult environmental problem of solid waste. The challenged statute is environmental legislation and the impact on interstate commerce is minimal. This Court should at least accord the Michigan legislature due deference in respect to this legislation. Under our federal system, states must have the ability to experiment and solve their problems. To closely restrict a state will rob our nation of innovative solutions to its problems.

At the very least, this Court should grant due deference to the state statutory scheme. The Court may also

consider overruling *Philadelphia v New Jersey*, insofar as it pertains to solid waste. The holding of *Philadelphia* when there is an express economic protectionist measure has relevance in other areas of the law, but it is not performing a valid function in respect to solid waste.

As stated in part IIA of this brief, it is believed that the *Philadelphia* decision as it relates to solid waste is open to question. The facts in *Philadelphia* are not relevant to how government, especially in Michigan, must respond to the solid waste crisis. Sophisticated statutory schemes are now dealing with the solid waste crisis. That is a far cry from the facts presented in *Philadelphia*.

Landfills are not natural resources. They can be located virtually anywhere, it is just a matter of cost of engineering a landfill. Garbage and other solid waste should not properly be considered as a commodity or item of interstate commerce. It is a substance that is discarded and for the safety and health of society should be handled and disposed of either through incineration or landfilling in a sanitary and safe manner.

In *Philadelphia*, Chief Justice Rehnquist, in a dissent, wrote:

“... virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes . . . ground and surface waters.’ App 149. The natural decomposition process which occurs in landfills also produces large quantities of methane and thereby presents a significant exposure hazard. *Id.* at 149, 156-157. Landfills can also generate ‘health hazards caused by rodents, fires and scavenger birds’ and,

'needless to say, do not help New Jersey's aesthetic appearance nor New Jersey's noise or water or air pollution problems.' Supp App 5.

"The health and safety hazards associated with landfills present appellees with a currently unsolvable dilemmas." 437 U.S. 617, 630.

#### IV.

#### THE STRICT SCRUTINY TEST IS INAPPLICABLE IN THIS CASE, BUT, ASSUMING FOR ARGUMENT PURPOSES ONLY THAT IT APPLIES, THE MICHIGAN ACT IS VALID.

As argued in this Brief, utilizing the *Pike* test, the strict scrutiny test should not be applied in this case. However, for sake of argument only, we will demonstrate that even under the strict scrutiny test, the Michigan statute is valid and not in violation of the commerce clause. The Michigan Solid Waste Management Act is clearly environmental legislation containing a comprehensive scheme for regulating the collection, handling, storing, transportation and disposal of solid waste. Garbage and solid waste, if left unattended, create health and environmental dangers and problems.<sup>17 18</sup>

In *Maine v Taylor*, 477 U.S. 131 (1985), a Maine law prohibited importation into the state of the golden shiner,

<sup>17</sup> For a discussion of what the applicable standards should be, see Shields, *Maine v Taylor: Natural Resource Statutes Against the Commerce Clause or When is a Hughes not a Hughes But a Pike?*, 29 Nat. Res. J. 291 (1989). At page 300, the author suggests, "Environmental and health laws may now have special dispensation and may no longer be subject to strict scrutiny under *Hughes* in practical effect."

<sup>18</sup> Footnote 12 of this Court's recent decision in *Wyoming v Oklahoma*, — U.S. —, 112 S. Ct. 789 (Jan. 22, 1992), recognizes there is no "clear line" separating cases of when strict scrutiny is appropriate.

a species of minnow. The act was clearly an embargo. The Court held, referring to the strict scrutiny test, that upon the showing of discrimination against interstate commerce, the state had the burden to demonstrate that the statute: 1) serves a legitimate local purpose and 2) that the purpose could not be served as well by available non-discriminatory means. The Court first found that Maine had a legitimate local purpose. It then considered whether there were alternate available non-discriminatory means. What was required of Maine was considerably less than what had been previously required in the strict scrutiny test. Maine did not establish that the imported fish would have parasites or whether the parasites would cause damage even if the fish did have them. It is believed that because Maine was carrying out an environmental purpose, the court gave greater emphasis to that legitimate local purpose rather than requiring greater proofs on alternatives.

The District Court and the Court of Appeals in this case considered the *Maine v Taylor* test. In validating the Michigan Act under the *Maine* test, each Court ruled that the local purpose is very strong and that the impact on interstate commerce is incidental.

The clearly stated legitimate local purpose of the Michigan Solid Waste Management Act has been stated many times in this brief. The Amendments to the Act, which are challenged by Petitioners, were merely to supplement and carry forth the other provisions of the Act. There are no reasonable alternatives to the Michigan scheme for planning for and disposing of solid waste. Michigan has a comprehensive program as described herein.

At page 48 of its Brief, Petitioner claims that Michigan has not exhausted all alternative means to slow all waste to Michigan landfills. It then cites in Footnote 31

various acts of Michigan which pertain to slowing waste to the landfills, such as prohibiting grass, leaves and yard clippings from being deposited in Michigan's landfills. What is not stated there is what has been described in this Brief, Michigan's statutory scheme of requiring each county to develop and implement comprehensive solid waste programs through the planning process. Michigan is on an aggressive course to address and solve its solid waste problem.

At page 49 of its Brief, Petitioner claims Michigan has not shown that it cannot accommodate new landfills, including landfills owned by the state. This, of course, is short-sighted and unrelated to realities. It is extremely difficult to establish new landfills. The state is mandating that sufficient landfill capacity be established whether owned by the state or by private parties as is forecasted to be needed, understanding the complexity of development of waste reduction, recycling, energy and similar programs. But for an active role by the state, landfill capacity could cease to exist in a short time.

What Petitioner and the Amicus National Solid Waste Management Association are advocating is that Michigan and other states continue to use up available landfill capacity, even if in short supply, to satisfy out-of-state needs. Simplistically it is stated that new landfills can be developed or that government can own and develop them. But that does not easily occur.

Another way to look at the landfill aspect of this matter is that landfills, to a great extent, are a land use issue. This Court has recognized on many occasions that decisions on land use and zoning should be left to local authorities. If the commerce clause requires states to accept waste from out-of-state without the ability to plan for it through a procedure such as Michigan's, then

Michigan will be forced to build even more landfills, which further preempts land use decision making.

The argument that a state can slow or stop the flow of waste to its landfill capacity is also short-sighted. If the flow is slowed or stopped, what would happen to the waste? Forecasting needs and then planning for those needs, including the creation of sufficient landfill capacity to answer the needs is a very complex and difficult process. Michigan is doing that by preempting its cities and townships from enforcing zoning restrictions against landfills when landfills are deemed necessary in a county solid waste plan. To take up Petitioner's argument, Michigan would be required to determine its needs and then forecast and create landfill capacity for the rest of the United States. The people whose zoning rights have been taken away from them, who must live with the nuisances of landfills while in operation and for many years afterwards, and who are paying for the landfill capacity, have a right not to have this limited manufactured capacity taken from them. They would have to start anew and suffer the burdens that should be otherwise distributed across the nation to states with the problem.

Other states with the solid waste problem must exercise the same responsibility that is being exercised by Michigan through its comprehensive solid waste program. That is not to say that another state cannot make arrangements with a state such as Michigan if that arrangement is consistent with good solid waste planning. Michigan does not have an embargo against out-of-state waste. All that is required is that the waste that is to come into Michigan be authorized in a comprehensive solid waste plan. That plan might include a requisite of the same solid waste reduction and recycling techniques as utilized in the county approving the

transfer. The solid waste field is highly regulated and should not be subject to unilateral shipments of waste which will otherwise destroy comprehensive solid waste plans.

It has been suggested that a state may chose to be restrictive since it can own and operate its own facility. As a market participant, the court recognizes the right to restrict the waste that is accepted. That is causing the socialization of the solid waste industry. In order not to be forced into creation of new landfills, government is taking over all landfills. It is again simplistic to suggest that private parties will obtain approvals throughout the United States for new landfills. Establishing new landfills is very difficult because no one wants them and that is a reality that the court should face.

In the brief of the Amicus National Solid Waste Management Association, it is contended that the Michigan Department of Natural Resources allows a county to have absolute veto power. That also is simplistic in that county plans must be developed considering rules and standards adopted by the Director of the Department of Natural Resources. The director oversees the planning process and approves the plans. Because one county denies entrance of solid waste from outside of its borders, this may be an indication that only sufficient capacity exists for the needs of that county. This picture cannot be painted with a broad brush. Many counties allow waste from outside that county including waste from out-of-state.

Providing adequate landfill capacity and handling the solid waste dilemma of today are complicated and difficult problems. There are no good solutions other than the states experimenting with comprehensive programs. The states must have the ability to solve their problems.

**CONCLUSION**

For the reasons set forth herein, this court should affirm the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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